



# Public Knowledge

August 19, 2013

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Re: Notice of *Ex Parte* Meeting in MB Docket No. 10-56, *Application of Comcast Corporation, General Electric Co., and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*

Dear Ms. Dortch:

On August 15, 2013, Harold Feld, Senior Vice President, Public Knowledge (PK), met with Sarah Whitesell, Media Advisor to Chairwoman Clyburn, both with regard to the above captioned proceedings. Specifically, PK reiterated its support for the Application for Review filed by the Content Companies for reversal of the Order issued by the Media Bureau on December 4, 2012. The December 2012 Order granted in part Comcast's request that any online video distributor (OVD) seeking access to Comcast-NBCU programming under the "peer programming condition" must first disclose the terms of its programming contracts to Comcast outside counsel and experts before seeking arbitration.

Public Knowledge agree with the Content Companies that this "clarification" converts a condition designed to mitigate Comcast's market power by facilitating OVD access to programming into a weapon by which Comcast can shut down any negotiation or gain competitive advantage over its competitors. All Comcast needs to do to avoid going to arbitration is demand to see the programming agreement. The OVD will then either withdraw the request or give up hope of making further deals with any other "peer" studio.

Alternatively, the programming contracts of Comcast's rivals will become accessible to Comcast as part of the negotiation of terms with the OVD. This disadvantages both the OVD and Comcast's rival studios, whose commercial terms are now disclosed.

For these reasons, PK agrees with the Content Companies that lifting the stay and affirming the Bureau Order will have a chilling effect on the willingness of Content Companies to make future deals with OVDs, or they will contractually require OVDs to forgo exercise of the merger condition. Either result would have the exact opposite intent of the Commission when it imposed the condition.

PK noted that this is *not* equivalent to a merger, where the party seeking protection has affirmatively sought the benefit of the Commission's process knowing that information would be placed in the public record subject to review by merger opponents. The Content Companies are

third parties, who may refuse to make deals with OVDs for fear of Comcast access to their programming contracts. Their concerns in this particular instance should therefore be given particular weight.

Furthermore, the record provides no support for the conclusion that allowing Comcast to view the programming terms prior to a request for arbitration will allow Comcast and OVDs to avoid arbitration altogether. However, if the Commission believes that it is appropriate to provide disclosure to avoid arbitration entirely, Comcast should be required to forfeit arbitration on all claims outside the four-corners of the programming agreement. Instead, in the event terms are not reached, Comcast would agree to proceed immediately to baseball arbitration on its “best offer” as against the OVD’s best offer. If Comcast wishes to preserve other matters for arbitration, it can wait until the arbitration to see the programming agreements.

In addition to the points raised at the meeting, Public Knowledge takes this opportunity to express frustration that more than ***one year*** has passed since Public Knowledge filed an informal complaint in this proceeding alleging that Comcast’s practice of exempting its own Xfinity content streamed to other devices via its broadband service from its data caps, while charging content streamed from rival sources against its data cap, violates the *Comcast/NBC-U* merger conditions.<sup>1</sup> But whereas the Bureau has acted expeditiously on Comcast’s request for clarification, and the Commission now seems poised to act on the request for reconsideration by the Content Companies, ***no one in the Media Bureau appears in the least motivated to address the concerns raised by public interest organizations*** in this proceeding.

Accordingly, before continuing to expedite Comcast’s request for clarification, the Bureau should first act on the pending complaint filed by Public Knowledge more than one year ago.

PK met separately with Alex Hoehn-Saric, Policy Director to Commissioner Rosenworcel and made the same points.

In accordance with Section 1.1206(b), this letter is being filed with your office. If you have any further questions, please contact me at (202) 861-0020.

Respectfully submitted,

/s/  
Harold Feld  
Senior V.P.  
PUBLIC KNOWLEDGE

cc: Sarah Whitesell  
Alex Hoehn-Saric

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<sup>1</sup> See Petition to Enforce Merger Condition of Public Knowledge (Filed August 1, 2013).